

No. 82-6583

FILED
JUL 15 1983

ALEXANDER L. STEVENS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

DIANE DANIEL, Appellant,

vs.

WALTER R. COLLIER, Appellee.

MOTION TO DISMISS APPEAL FROM THE
MICHIGAN COURT OF APPEALS
OR IN THE ALTERNATIVE
MOTION TO AFFIRM THE JUDGMENT OF THE
MICHIGAN COURT OF APPEALS

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The Appeal and Jurisdictional Statement filed on behalf of the Plaintiff Appellant, Diane Daniel, should be denied or in the alternative the Judgment of the Michigan Court of Appeals summarily affirmed. Whether the six year period of limitations found in Michigan's Paternity Act, MCL 722.714(b); MSA 25.494(b), during which paternity must be established denies equal protection of the law in violation of the US Const amend XIV, §1 does not present a substantial federal question. The Appellants second issue, relating to the effect of Michigan's tolling provisions and other

circumstances, was not raised in the trial court nor specifically reviewed by the Michigan Court of Appeals, that court having determined that the cause of action is defined by statute as belonging to the mother, the father or the Department of Social Services.

FACTS OF THIS CONTROVERSY

Diane Daniel, through the offices of the Saginaw County Department of Social Services, initiated an action against Walter R. Collier under the Michigan Paternity Act, MCL 722.711 et seq.; MSA 28.491 et seq., on March 5, 1980. In the Complaint she alleged that Defendant was the biological father of De Entree L. Ezell who was born on December 18, 1973.

A Motion for accelerated judgment, GCR 1963, 116, in lieu of an answer was filed on Defendant's behalf raising the statute of limitations defense. The motion was supported by Defendant's affidavit stating that he had never acknowledged the child, never contributed to the child's support, nor had he been absent

from the State of Michigan within the six year period of limitations, any of which would toll the limitation's period. MCL 722.714(b); MSA 25.494(b).

No counter affidavits challenging these factual matters were filed by Plaintiff. Plaintiff did file an answer to the motion claiming the limitations period was unconstitutional under the equal protection clause of the Federal and State Constitutions because an action could be brought to enforce the support obligation of a child born during marriage, allegedly, at any time during the child's minority.

The trial court dismissed the action and rejected the constitutional argument and granted Defendant's motion. Plaintiff appealed to the Michigan Court of Appeals which affirmed the trial court. Daniel v Collier, 113 Mich App 74; 317 NW2d 293 (1982).

Plaintiff raised for the first time at oral argument before the Michigan Court of Appeals the concern of tolling the action

during the child's minority as most other actions are tolled under Michigan law, MCL 600.5851(1); MSA 27A.5851(1). The Court of Appeals held, consistent with the language of the Paternity Act and prior Michigan precedent, that the cause may be brought only by the mother, father or the Department of Social Services and on that basis rejected the existence of any unequal treatment. The Court found in essence that the child is not a proper party Plaintiff. Daniel v Collier, 113 Mich App 74, 78.

The Court of Appeals also rejected Plaintiff's basic equal protection argument holding that the legislative determination to bar paternity claims first made after six years was "not unreasonable in light of the State's legitimate interest in discouraging the bringing of stale or fraudulent claims." Daniel v Collier, 113 Mich App 74, 78.

The Michigan Supreme Court denied Plaintiff's application for leave to appeal on February 22, 1983. Plaintiff then filed the

Notice of Appeal and supporting documents with this Court.

STATUS OF ILLEGITIMATE CHILDREN IN MICHIGAN

Once paternity is established the mother or other custodian of a child born out of wedlock is entitled to have the level of support determined without consideration of the legitimacy of the child. Whybra v Gustafson, 365 Mich 396; 112 NW2d 503 (1961). Likewise, legitimacy is not a consideration in modifying an order for support. Boyles v Brown, 69 Mich App 480; 245 NW2d 100 (1976).

Under Michigan law the duty to support a child is a joint and several liability of both biological parents. MCL 722.712; MSA 25.492. This joint and several obligation may be enforced by either parent, or a custodian, as part of a divorce judgment or in a separate action, MCL 552.333; MSA 25.221 or MCL 552.451a; MSA 25.222(1a), if the child is born during wedlock.

In line with the general scheme of recognizing a joint liability in the parents to support children the legislature created a cause of action for contribution toward support of children born out of wedlock. The child itself, is not a proper party Plaintiff under the Act. MCL 722.714; MSA 25.494. This is consistent with support actions in Michigan generally. There is no authority for the proposition that under Michigan law a child may, in his own name, sue either parent for support at anytime during or after its minority.

All concerns of level of support or modifications of support can occur, obviously, only after a child's paternity is established. For children born out of wedlock the present paternity act, 1956 PA 205 as amended, this action must be commenced by a proper Plaintiff within six years of the child's birth unless the limitations period is otherwise tolled. It is this restriction which Plaintiff challenges.

The Michigan Court of Appeals has consistently found this limitation on the opportunity to enforce the joint obligation for support to be justified by the State's interest in discouraging the bringing of stale and fraudulent claims and a legislative recognition of the added problems of proof imposed on a putative father by delay. Daniel v Collier, supra, McFetridge v Chiado, 116 Mich App 528; 323 NW2d 470 (1982), Shifter v Wolf, 120 Mich App 182; _____ NW2d _____ (1982).

The period of time allowed for bringing this action is equivalent to that for actions for breach of contract, MCL 600.5807(8); MSA 27A.5807(8) and exceeded only by the time period allowed for such actions as enforcement of Judgments (ten years), MCL 600.5809(3); MSA 27A.5809(3) or recovery of real property (adverse possession, fifteen years), MCL 600.5801; MSA 27A.5801.

Unless this Court is now willing to rule that, as a matter of Federal Constitutional law, a State may not regulate the time within

which an action to establish paternity may be brought or that a State may not regulate the proper party's Plaintiff in such an action the Judgment of the Michigan Court of Appeals must be affirmed.

IMPACT OF MILLS AND PICKETT

This Court first addressed the Constitutionality of a period of limitations to establish paternity in Mills v Habluetzel, 456 US 91; 102 S Ct 1549; 71 L Ed 2d 770 (1982). In Mills the Court struck down the Texas one year limitations period on the child's action for paternal support. Justice Rehnquist stated for the Court:

"If Gomez [v Perez 409 US 535; 93 S Ct 872; 35 L Ed 2d 56 (1973)] and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock.

It would hardly satisfy the demands of equal protection and the holding of Gomez to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively." 456 US 91, _____.

After recognizing that there is a factual and practical difference in paternity actions where the child is born out of wedlock the Court held:

"... in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the later. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate State interest. ... The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increase vulnerability to fraudulent claims."

The Court struck down the Texas period of limitations because it found that one year was not sufficiently long to present a reasonable opportunity to assert the claim and that there was no substantial relation between the one

year limitations period and the State's interest in avoiding litigation of stale or fraudulent claims.

More recently the Court examined the two year period of limitations contained in the Tennessee Paternity Act. The Court struck down this limitation on paternity suits, finding no Constitutionally significant differences between the Tennessee statute with its two year limitation and the one year limitation struck down in Mills. Pickett v Brown, 51 USLW 4655 (US S Ct Docket No. 82-5576, released June 6, 1983). The Court again employed the two-step analysis of Mills with the same results. 51 USLW 4655, 4659. The Court additionally pointed to the distinction in Tennessee law between those children who are likely to become public charges, to whom there was no restriction on the bringing of an action and the fact that Tennessee tolls most actions during a child's minority.

The Michigan statute allows six years for the bringing of an action to establish

paternity. During that six years the mother will certainly have recovered from the financial and emotional burdens which the Court relied upon in striking down the Texas and Tennessee statutes. As pointed out by the Appellant most paternity actions in Michigan are brought by the Department of Social Services. Additionally, Michigan tolls the requirement of bringing a paternity action if the father acknowledges the child, contributes to the child's support or if the putative father is absent from the State. At six years of age the child will have entered school and if the mother is ever to get on with her life she logically would have done so by then.

Justice Brennan, writing for the Court in Pickett referred to the point that under Tennessee law the father's duty of support is owed to the child not to the mother. 51 USLW 4659, n 15. Under Michigan law the obligation is a joint one and the action is in the nature of a one for contribution. As indicated above, Michigan has not to this point recognized the

direct action by a child for support nor was this case argued below on this basis.

Six years is an adequate opportunity to commence an action to determine paternity. It is longer than the time allowed for actions in Michigan generally. The legislative decision to bar suits after six years strikes the proper balance between the State's interest in avoiding excessive welfare burdens, the mother's interest in having contribution to support and the State's interest in having its Courts free from stale claims. It also properly recognizes the increased likelihood of fraudulent claims based on changed circumstances and the additional burdens of proof often recognized by this Court. In the language of the prior cases the six year period of limitations in the Michigan statute bares a substantial relation to the State's interest in avoiding the litigation of stale or fraudulent claims.

The appeal should be dismissed for failure to present a substantial federal question or in the alternative the Judgment of the Michigan

Court of Appeals affirmed for the failure of the Plaintiff to raise the arguments which it now advances either in the trial court or the Court of Appeals.

Respectfully submitted,

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